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IN THE

# Supreme Court of The United States

OCTOBER TERM, 1969

NO. [redacted] 91

LOUIE L. WAINWRIGHT, Director,
Division of Corrections,
State of Florida, Petitioner,

—vs—

NICHOLAS CAPPETTA,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorney General

RAYMOND L. MARKY
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Tallahassee, Florida

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## TOPICAL INDEX


| | PAGES |
|---|---|
| PRELIMINARY STATEMENT | 1 |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTION PRESENTED | 2 |
| STATUTES INVOLVED | 3 |
| STATEMENT OF THE FACTS AND CASE | 3, 4 |
| ARGUMENT | 4—6 |
| CONCLUSION | 7 |
| PROOF OF SERVICE | 7 |
| APPENDICES | |


## TABLE OF CITATIONS


| | PAGES |
|---|---|
| Burnett v. Gladden, 228 F. Supp. 527 (D.C.D.Ore., 1964) | 5 |
| Carafas v. LaVallee, 391 U.S. 234, 20 L.Ed.2d 554 (1968) | 3, 4, 5, 7 |
| In re Thorensen, 1st Cir. 1968, 395 F.2d 466 | 5 |
| Parker v. Ellis, 362 U.S. 574, 4 L.Ed.2d 963, 80 S. Ct. 909 (1960) | 3, 4, 5 |
| Peyton v. Rowe, 391 U.S. 54 (1968) | 5, 6, 7 |
| U.S. ex rel. Rivera v. Reeves, 246 F.Supp. 599 (S.C.S.D.N.Y., 1965) | 5 |

IN THE

# Supreme Court of The United States

OCTOBER TERM, 19__

NO. _____

LOUIE L. WAINWRIGHT, Director,
Division of Corrections,
State of Florida,

Petitioner,

—vs—

NICHOLAS CAPPETTA,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PRELIMINARY STATEMENT

Louie L. Wainwright, Director of the Division of Corrections for the State of Florida, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals in and for the Fifth Circuit entered on February 3, 1969.

## OPINIONS BELOW

The initial opinions of the Federal District Court in and for the Southern District of Florida were filed on April 22, 1968, May 9, 1968, and June 7, 1968, and the same are to be found in Appendix I. Said decisions are reported in 286 F. Supp. 404.

The opinion of the United States Court of Appeals in and for the Fifth Circuit, dated February 3, 1969, is not yet reported. Said opinion is reproduced and included in Appendix II.

## JURISDICTION

The jurisdiction of this Court to enter the writ of certiorari is invoked pursuant to 28 U.S.C., Section 1254 (1).

## QUESTION PRESENTED

DID THE COURT OF APPEALS, FIFTH CIRCUIT, PROPERLY CONCLUDE THAT THE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN THE PETITION FOR WRIT OF HABEAS CORPUS WHEN THE RECORDS AFFIRMATIVELY ESTABLISH THAT THE SENTENCE, WHICH PETITIONER ALLEGED WAS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, HAD EXPIRED PRIOR TO THE FILING OF THE PETITION?

## STATUTES INVOLVED

The statute construed in the instant case is 28 U.S.C.A., Section 2241 (c) (3).

## STATEMENT OF THE FACTS AND CASE

On or about March 15, 1968, the respondent herein filed a Petition for Writ of Habeas Corpus in the United States District Court, Southern District of Florida, attacking a five year judgment and sentence entered on January 10, 1963, by the Criminal Court of Record in and for Dade County, Florida (R 2). An Order to Show Cause was issued and petitioner herein filed a Response attacking the jurisdiction of the cause inasmuch as the *sentence had expired prior to the filing of the petition* (R 52). The sentence had expired on December 7, 1967 (R 59). Petitioner herein also answered the petition on the merits. The District Court, on the authority cited by the petitioner herein, entered an order dismissing the petition on the grounds that the respondent herein was no longer in custody under the sentence which he was attacking (R 158). Subsequent thereto, this Court rendered its decision in *Carafas v. LaVallee*, 391 U.S. 234, 20 L. Ed. 2d 554 (1968), overruling *Parker v. Ellis*, 362 U.S. 574, 4 L. Ed. 2d 963, 80 S. Ct. 909 (1960). Pursuant to petitioner's (respondent herein) application for a Certificate of Probable Cause (R 167-168), the District Court reconsidered its Order of April 22, 1968, in light of *Carafas v. LaVallee*, supra, and concluded that said case did not deal with the situation presented here and held the Court was without jurisdiction under the federal habeas corpus statutes. Said District Court granted certificate of probable cause and an

appeal was taken to the Circuit Court of Appeals, Fifth Circuit. The Court of Appeals, Fifth Circuit, although recognizing that *Carafas v. LaVallee*, supra, was not applicable, reversed the cause to determine if under Florida law respondent herein would be entitled to release from confinement.

## ARGUMENT

The petitioner herein respectfully submits that the holding of the Court of Appeals, Fifth Circuit, is directly contrary to this Court's decision in *Parker v. Ellis*, supra, as modified by this Court's recent opinion in *Carafas v. LaVallee*, supra.

The opinion in *Carafas v. LaVallee* clearly states that the ". . . federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus *is filed.*" 20 L. Ed. 2d 554 at 559. The opinion further notes that ". . .once federal jurisdiction has attached in the district court it is not defeated by the release of the petitioner prior to the completion of the proceedings of the application . . ." 20 L. Ed. 2d 554 at 558. As was noted by the District Court, the petition herein was not filed until the sentence attacked (only this judgment was questioned in the habeas corpus petition, R 2) had been completely served.

Close examination of the opinion of the Court of Appeals, Fifth Circuit, discloses that that Court has confused *mootness* with *lack of jurisdiction.* In *Carafas* this Court held the matter did not become moot since the court initially had jurisdiction and such jurisdiction was not defeated by the release of the petitioner. Footnote 12 of this Court's opinion in the *Carafas* case reveals that *Parker v. Ellis* was overruled only to that extent that it held a subsequent release rendered the issue moot.

Indeed, the dissenting opinion in *Parker*, supra, authored by Chief Justice Warren, makes it abundantly clear that in that case mootness was the issue, not jurisdiction.

Although somewhat distinguishable in the recent case of *In re Thorensen*, 1st Cir. 1968, 395 F. 2d 466, the Court of Appeals, First Circuit, held that notwithstanding *Carafas v. LaVallee*, supra, where the applicant was released prior to filing his petition, the court was without jurisdiction because he was not in custody as required by 28 U.S.C., Section 2241 (c) which was necessary for the issuance of the writ. By like token, in the instant case the respondent herein, although in custody pursuant to an unrelated judgment and sentence, was not in custody pursuant to the judgment and sentence alleged to be in violation of the United States Constitution.

The Court of Appeals' reliance upon cases dealing with recidivist statutes is misplaced for the prior conviction is a necessary element in the judgments and sentences under said statutes. Additionally, the prior expired judgment and sentence is always open to attack at the time of the prosecution under the recidivist statutes. See: *U.S. ex rel. Rivera v. Reeves*, 246 F. Supp. 599, (D.C.S.D.N.Y., 1965); *Burnett v. Gladden*, 228 F. Supp. 527(D.C.D.Ore., 1964), both cited in footnote 12 of the *Carafas* opinion.

If the decision of the Court of Appeals is allowed to stand, a prisioner may sit back and wait until the judgment and sentence has long been served before presenting his claims when *Peyton v. Rowe*, 391 U.S. 54 (1968) was designed for the purpose of disposing of these matters promptly because ". . .postponement of the adjudication of such issues can harm both the prisoner and the State and lessens the probability that final disposition

of the case will do substantial justice. . .” 20 L. Ed. 2d at 432. Furthermore, it would authorize the maintenance of additional petitions, thereby adding an increased burden upon both the federal and state courts at a time when the dockets are already overcrowded. It is urged that this is without justification inasmuch as the rights now accorded the criminally accused at the trial stage have been broadened so as to insure their presentation at the trial. It is respectfully submitted that with the expansion of the rights accorded the criminal accused prior to trial, during trial and on appeal, there should be a corresponding restriction upon the availability of habeas corpus, lest those who have already had direct review of their judgments and sentences impair the Court's ability to adequately consider matters before them for the first time by filing successive and frivolous post conviction pleadings.

## CONCLUSION

It is respectfully urged that the Court of Appeals, Fifth Circuit, erroneously extended this Court's pronouncement in *Carafas v. LaVallee* by confusing the doctrine of mootness with that of jurisdiction and that said decision will encourage litigation and frustrate the policy expressed in *Peyton v. Rowe*, supra.

It is for the aforesaid reasons that petitioner prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

RAYMOND L. MARKY
Assistant Attorney General

Counsel for the Petitioner.

## PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and to Mr. Nicholas Cappetta, P.O. Box 221, Raiford, Florida, by mail this _____ day of April, 1969.

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

Of Counsel for Petitioner

# APPENDICES

## APPENDIX I

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 68-315-Civ-TC

NICHOLAS CAPPETTA, C-008033,
Petitioner,

v.

LOUIE L. WAINWRIGHT, Director,
Division of Corrections,
State of Florida,

Respondent.

**ORDER**

This is a petition for writ of habeas corpus filed by Nicholas Cappetta, a state prisoner. The state has filed its response to the petition pursuant to the Court's order of March 19, 1968.

Petitioner was tried and convicted of breaking and entering and grand larceny in the Criminal Court of Record in and for Dade County, Florida; case No. 62-5350. On January 10, 1963, he was sentenced to a term of five years imprisonment. It appears from the respondent's Exhibit "A" that the sentence herein attacked expired on December 7, 1967, and accordingly, petitioner is no longer in custody under the sentence which he

attacks. Therefore habeas corpus is not available to him. Parker v. Ellis, 362 U.S. 574 (1960); Bonnie v. Gladden, 377 F.2d 555 (9th Cir. 1967); Ward v. Oklahoma, 376 F. 2d 847 (10th Cir. 1967). Accordingly, it is

ORDERED and ADJUDGED that the petition for writ of habeas corpus be and the same is hereby denied.

DONE and ORDERED at Miami, Florida, this *22nd* day of April, 1968.

UNITED STATES DISTRICT JUDGE

CC:
Nicholas Cappetta, Petitioner.
Assistant Attorney General.

**APPENDIX I**

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 68-315-Civ-TC

NICHOLAS CAPPETTA, C-008033,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida,

Respondent.

**ORDER**

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This cause came before the Court on petitioner's petition for rehearing, and the Court having considered the same and being otherwise advised in the premises, it is

ORDERED and ADJUDGED that the petition of Nicholas Cappetta for rehearing be and the same is hereby denied.

DONE and ORDERED at Miami, Florida, this 9th day of May, 1968.

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UNITED STATES DISTRICT JUDGE

Copies to:

Nicholas Cappetta, Petitioner.
Assistant Attorney General

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 68-315-Civ-TC

NICHOLAS CAPPETTA, C-008033,

Petitioner,

v. ORDER

LOUIE L. WAINWRIGHT, Director,
Division of Corrections,
State of Florida,

Respondent.

This cause came before the Court on the petition of Nicholas Cappetta for certificate of probable cause to appeal the denial of his petition for writ of habeas corpus entered April 22, 1968.

Petitioner was tried and convicted in the Criminal Court of Record of Dade County, Florida, and sentenced on January 10, 1963, to a term of five years imprisonment. Previously thereto, in May of 1962, it appears that he had been sentenced in another case, and that for some reason unexplained in the record, the May, 1962, sentence commenced at the expiration of the January, 1963, sentence. After exhausting state remedies, petitioner on March 15, 1968, filed this petition for writ of

habeas corpus directed to his January, 1963, sentence. The response of respondent revealed that in December, 1967, the sentence which petitioner here attacks expired and that at the time of the filing of this petition he was serving the May, 1962, sentence which is not here attacked. Accordingly, this Court held that notwithstanding petitioner's arguments that voiding of the January, 1963, sentence would result in immediate release (inasmuch as apparently the May, 1962, sentence would be deemed then to have run from date of sentence and thus to have expired), this Court was without jurisdiction under the federal habeas corpus statutes to grant relief. The basis of the Court's order was that the petition was moot and the Court expressly relied on Parker v. Ellis, 362 U.S. 574 (1960).

Subsequent to the filing of the petition for certificate of probable cause Parker v. Ellis was expressly overruled in Carafas v. LaVallee, U.S. Supreme Court No. 71 (May 20, 1968). However, this Court is still of the opinion that it lacks jurisdiction under the federal habeas corpus statutes inasmuch as the petition herein was not filed while petitioner was in custody under the sentence being attacked. All that *Carafas* did, it appears, was to overrule that part of Parker v. Ellis which held that subsequent release rendered a petition moot. As the Court said,

> In Parker v. Ellis, as in the present case, petitioner's application *was filed in the Federal District Court when he was in state custody*, and in both the petitioner was unconditionally released from state custody before the case could be heard in this Court. For the reasons which we herein summarize and which are stated at length

> in the dissenting opinions in Parker v. Ellis, we conclude that under the statutory scheme, *once the federal jurisdiction has attached in the District Court,* it is not defeated by the release of the petitioner prior to completion of proceedings on such application. (Emphasis supplied.) Carafas v. LaVallee, *supra.*

However, since *Carafas* did not expressly deal with a situation as here, i.e., expiration of sentence prior to filing of petition, this Court is of the opinion that probable cause for appeal does exist in this case and that a certificate should be granted and petitioner be allowed to appeal *in forma pauperis.* Accordingly, it is,

ORDERED and ADJUDGED that the petition of Nicholas Cappetta for certificate of probable cause to appeal be and the same is hereby granted, and petitioner is further granted leave to appeal *in forma pauperis.*

DONE and ORDERED at Miami, Florida, this 7th day of June, 1968.

UNITED STATES DISTRICT JUDGE

Copies to:
Nicholas Cappetta
Assistant Attorney General, Miami, Florida.

APPENDIX II

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26679

NICHOLAS CAPPETTA,
Plaintiff-Appellant,

versus

LOUIE L. WAINWRIGHT, Director,
Division of Corrections, State of Florida.
Defendant-Appellee.

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA*

(February 3, 1969)

Before BELL, AINSWORTH, and GODBOLD,
Circuit Judges.

BELL, Circuit Judge: Pursuant to Rule 18 of the Rules of the Court, this case has been placed on the summary calendar for disposition without oral argument. [1]

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[1] In order to establish a docket control procedure, the Fifth Circuit adopted new Rules 17-20 on December 6, 1968. See *Wittner v. United States*, 5 Cir., 1969____ F.2d____(No. 25,781, slip opinion dated January____, 1969), Fn 1 and Appendix thereto.

## CAPPETTA v. WAINWRIGHT

This is a pro se appeal by a Florida state prisoner from the denial of his petition for a writ of habeas corpus. The petition attacked a judgment of conviction and the five year sentence imposed thereon in the Criminal Court of Record of Dade County, Florida for breaking and entering, and grand larceny.

The state responded by contesting the jurisdiction of the federal habeas court on the ground that the sentence under attack had expired prior to the filing of the petition. The District Court dismissed the petition on this ground on April 22, 1968, citing *Parker v. Ellis*, 1960, 362 U.S. 574, 80 S.Ct. 909, 4 L. Ed. 2d 968. On May 20, 1968, the Supreme Court rendered its opinion in *Carafas v. LaVallee*, 1968, 391 U.S. 234, 88 S. Ct. 20 L. Ed. 2d 554. The District Court then reconsidered its order of April 22, 1968 and again denied relief. The court was of the view that Carafas overruled only that part of *Parker v. Ellis* which had held that subsequent release, i.e., after having filed the petition for the writ while in custody, mooted the petition. Since there was no petition here until after the expiration of the sentence under attack, the court held that *Carafas* had no effect on its earlier order. The sole issue on this appeal is the question of jurisdiction under the circumstances.

Appellant is in custody in Florida under another sentence and was at the time the petition in question was filed. It appears that he had been convicted and sentenced on an unrelated offense by the Criminal Court of Record of Hillsborough County, Florida. It is alleged that the Hillsborough sentence was made to commence upon expiration of the Dade County sentence. Thus, although the Dade conviction which is here being attacked has expired, the appellant is still in custody under the Hillsborough conviction.

It is appellant's claim that his Hillsborough sentence would date back to its original imposition in the event the Dade County sentence is set aside. He urges that he would be entitled to full credit on the Hillsborough sentence for time served on the Dade sentence with the result of immediate release.

The *Carafas* case speaks directly to two situations. The first is the prisoner who files his petition while in custody on one charge and whose term of imprisonment expires and who is released before the petition is finally adjudicated. *Carafas* holds that such a petition does not become moot merely because the person is no longer in custody if he was in custody when the petition was filed. The second situation is the prisoner whose term of imprisonment expires and who is released before he ever files a habeas petition. *Carafas* expressly states: "The federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed . . .". The instant case presents a situation somewhat different in that the petition was while the petitioner was "in custody" but for another offense and on a separate sentence which is not being attacked.

The question of whether "in custody" in 28 USCA, § 2241 (c) (3)[2] means "in custody for the offense being attacked" would seem to have been answered in the negative in cases involving recidivist statutes. See *Stubblefield v. Beto*, 5 Cir., 1968, 399 F. 2d 424; *United States v. LaValle*, 2 Cir., 1964, 330 F. 2d 303. In these cases, prisoners incarcerated under

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[2] 28 USCA, § 2241:

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

recidivist statutes were allowed to contest convictions, the sentences for which had already been satisfied. The reason that such attacks were allowed on prior convictions with sentences already satisfied was that the earlier conviction bore some positive relation to their present confinement to the extent that were the prior convictions invalidated, the petitioner's present confinement would be shortened or terminated. Cf. also *Peyton v. Rowe*, 1968, 391 U.S. 54, 88 S.Ct. , 20 L. Ed. 2d 426, 492, describing habeas corpus as a method whereby a prisoner may require his jailer to justify the detention.

Appellant is essentially contesting his detention here. He maintains that his prior sentence is so connected to his present confinement as to warrant the attack. This is his argument that a successful attack on the Dade sentence will result in his release under the Hillsborough sentence, presumably though unstated, because of some Florida law allowing credit under the circumstances or because of the wording of the Hillsborough sentence. That sentence is not a part of the record and was apparently not before the District Court. Appellant cites no Florida or other authority providing such a form of credit. The state does not address the point.

We hold that the court has jurisdiction under the federal habeas statute, 28 USCA, § 2241, to determine whether the relationship, as claimed, between the present confinement and the Dade County judgment is such as would result in the appellant receiving credit in some degree on the Hillsborough sentence if he should prevail on the merits of his petition. The answer to this question will determine whether the court should then proceed to the merits of the petition.

REVERSED and REMANDED for further proceedings not inconsistent herewith.

*APPENDIX*

## RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

### RULE 17
### DOCKET CONTROL

In the interest of docket control, the chief judge may from time to time, in his discretion, appoint a panel or panels to review pending cases for appropriate assignment or disposition under Rules 18, 19 or 20 or any other rule of this court.

### RULE 18
### SUMMARY CALENDAR

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(2) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

### RULE 19
### MOTION TO DISMISS OR AFFIRM

Within fifteen days after the appeal has been docketed in this court, the appellee may file a motion to dismiss or a motion to

affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss. The fifteen day provision may be waived by the court on proper showing of reasonable excuse for delay in filing a motion to dismiss or affirm, upon such terms and conditions as the court may prescribe, or such waiver may be granted sua sponte on the part of the court.

(a) The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court.

(b) The court will receive a motion to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The motion to dismiss or affirm shall be filed with the clerk in conformity with Rule 27 of the Federal Rules of Appellate Procedure.

The appellant shall have ten days from the date of receipt of the motion to dismiss or affirm within which to file a response opposing the motion. Such response may be typewritten and four copies, with proof of service, shall be filed with the clerk. Upon the filing of such response, or the expiration of the time allowed therefor, or express waiver of the right to file, the record on appeal, motion and response shall be distributed by the clerk to the court for its consideration.

After consideration of the papers distributed pursuant to the foregoing paragraph the court will enter an appropriate order.

The time for filing briefs pursuant to Rule 31 of the Federal Rules of Appellate Procedure shall not be tolled or extended by the filing of a motion to dismiss or affirm.

## RULE 20
## FRIVOLOUS AND UNMERITORIOUS APPEALS

If upon the hearing of any interlocutory motion or as a result of a review under Rule 17, it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed without the notice contemplated in Rules 18 and 19.